IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 860

BROTHERHOOD OF SLEEPING CAR PORTERS, *Petitioner*,

v.

FRED THOMPSON, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI AND ANNEXED BRIEF

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MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI, AND ANNEXED BRIEF

The Railway Labor Executives' Association hereby respectfully moves the Court for leave to file the annexed brief as *amicus curiae* in support of the petition for certiorari filed by the Brotherhood of Sleeping Car Porters. Consent of the petitioner for the Association to participate *amicus curiae* has been obtained; the consent of counsel for respondent was requested but refused.

INTEREST OF THE ASSOCIATION

The Railway Labor Executives' Association on whose behalf this brief as *amicus curiae* is sought to be filed is a voluntary unincorporated association located in Washington, D. C., comprised of the chief executive officers of each of the following standard national and international railway labor organizations:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railroad Trainmen
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood Railway Carmen of America
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employees and Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Switchmen's Union of North America
Transportation-Communication Employees Union

The foregoing organizations affiliated with the Railway Labor Executives' Association (RLEA or Association) represent, for collective bargaining purposes under the Railway Labor Act, the bulk of the nation's rail employees, and this Court has recognized the Association as a proper party to appear and speak for these affiliated organizations and their railroad employee members. *Interstate Commerce Commission* v. *Railway Labor Executives' Association,* 315 U.S. 373; *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142; *American Trucking Associations, Inc., et al.* v. *United States,* 355 U.S. 141.

Each of these organizations is a party to collective bargaining agreements with nearly every railroad in the United States governing the rates of pay, rules, and working conditions of the craft or class of employees which it represents. Said organizations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application.

Under the decision below the Brotherhood of Sleeping Car Porters, undertaking to fairly represent a railroad employee performing duties within the craft of employees it represents, and exercising its duty to fairly interpret provisions of a collective bargaining agreement setting forth the rules and working conditions governing such employees, is charged with having exercised *hostile discrimination* toward the respondent because of its failure to prosecute with the employee's railroad employer a grievance as to which it believed there was no merit, and has been assessed damages computed not only on the basis of an estimate of back wages purportedly unlawfully denied respondent but

which include *future* damages calculated in accordance with a state mortality table.

The questions presented by the appeal in this case are of the utmost importance to the Association, the individual organizations affiliated with it, and the thousands of railroad employees who have chosen such organizations as their collective bargaining representatives under the Railway Labor Act. The extent to which these organizations can continue to fulfill their foregoing statutory duties and functions and the procedures to which they must resort to do so are directly and vitally involved in the issues in this case. The issues in this case thus are of great concern to the *amicus curiae* and their proper resolution by this Court is a matter of the highest importance, not merely to the petitioner organization but to railroad labor as a whole.

Wherefore, the Association moves the Court for leave to file the brief annexed hereto in support of the petition for certiorari.

Respectfully submitted,

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the petition of the Brotherhood of Sleeping Car Porters.

Briefly stated this case shows that the respondent, a railway employee acquiring seniority as a *train* porter by reason of his assignment in 1948 to a regular job in that classification, sought in 1952 to have his employer grant him a seniority date of 1948 in the classification of *mail* porter. The employing railroad refused

to consider the request. Respondent thereafter sought the assistance of petitioner, culminating in his being given a *mail* porter's seniority date of 1956.

The opinion of the Court of Appeals describes the evidence of record (Pet., p. 44) as showing that respondent protested without success at various times during the period 1950-1956 his failure to obtain a seniority date as mail porter. The Court stated that "the evidence permitted a jury finding that the union, possessing complete knowledge of Thompson's position from 1950 through 1956, breached its obligation by not seeking for him in 1953 seniority as of that year, even though Thompson himself then thought he was entitled to seniority as of 1948" (Pet., p. 47).

The case was before the District Court on remand from a prior decision and judgment of the Fourth Circuit, 316 F.2d 191 (C.A. 4th, 1963), for resolution of the question of whether the conduct of petitioner constituted (243 F. Supp. 261, 263):

> "invidious discrimination", "reasonableness", "good faith and honesty": Did the plaintiff show that he received different or substantially substandard representation at the hands of the Brotherhood? If so, was it because of some improper reason, such as his unsatisfactory union status? Did this treatment cause him injury? If the answers of the trier of fact to the three questions are in the affirmative, the plaintiff is entitled to relief.

There was thus a series of qualitative questions before the District Court presenting inquiries to be answered in measurement against the standard of fair and reasonable representation, imposed by law upon petitioner, and in measurement against the conduct of

petitioner towards others similarly situated as respondent to whom petitioner owed the same statutory duty. The petition herein shows that the decision sought to be reviewed does not disclose that the controversy was resolved in accordance with the prior direction of the Court of Appeals and as such is contrary to relevant principles of law enunciated by this Court.

INTEREST OF THE ASSOCIATION

The interest of the Association is set forth in the annexed motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

1. The decision and judgment of the Court of Appeals discloses that the conduct of petitioner has not been tested fairly by the statutory standard of fair representation imposed on it.

The prior opinion of the Court of Appeals at 316 F.2d 191, 197-200, set forth fully, with citation of substantial judicial precedents, the duty of fair representation owed by a collective bargaining agent to the members of the class of employees it represented. Nowhere in its discussion of that duty does the Court of Appeals deny the proposition that a collective bargaining agent is permitted to act in accordance with its judgment and discretion so long as its actions are fair and uniform in all similar situations. While petitioner reasonably may be found to have failed to press with respondent's railroad employer a grievance which petitioner believed to be meritless, a judgment shared in by the railroad, petitioner cannot on that basis properly be found to have exercised "invidious discrimination", "unreasonableness", and the lack of "good faith and honesty."

As the Court said in *Humphrey* v. *Moore,* 375 U.S. 335, 349-350:

> . . . we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. In *Ford Motor Co.* v. *Huffman,* 345 US 330, 97 L ed 1048, 73 S Ct 681, the Court found no breach of duty by the union in agreeing to an amendment of an existing collective bargaining contract, granting enhanced seniority to a particular group of employees and resulting in layoffs which otherwise would not have occurred. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Id., 345 US at 338, 97 L Ed at 1058. Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

In substance, it will be found that the judgment below rests substantially on conduct attributed to a *Field Organizer* of petitioner whose duties and interests did

not relate to contract grievance matters but did relate to union membership solicitation, and on the fact that certain other porters employed by the railroad obtained seniority dates in advance of the respondent. While showing correctly that the collective bargaining agreement provided that porters *employed initially as mail porters* would obtain seniority on the mail porter roster, and retain it if later they were promoted to regular jobs as *train* porters at which time they would acquire also seniority on the train porter roster, the courts below indulge themselves the fiction that the reverse was true. That the contracts do not so provide is clearly shown by the marginal notes to the Circuit Court's opinion (316 F.2d 191, 193-194, note 4). Such progressions from mail porter to train porter easily explain, as the testimony before the District Court shows, why certain employees were listed on both rosters, a fact which apparently disturbed both courts below, and which fact was obviously but unwarrantedly relied upon to show dissimilar or discriminatory treatment of employees similarly situated as respondent.

In the same superficial manner, the court below accepts the proposition that petitioner's attempted but unsuccessful effort to settle respondent's grievance unfairly prejudiced respondent, and amounted to hostile discrimination. It is obvious that such a charge cannot be made in the absence of a showing that petitioner acted or would have acted otherwise as concerned other employees similarly situated as respondent. The record is devoid of any tangible evidence to warrant such a conclusion albeit required for the judgments reached by the lower courts.

2. The decision and judgment of the Court of Appeals sustaining an award of *future* damages to

respondent erroneously approves of a misinterpretation of recent rulings of this Court. Reliance by the lower courts on the decisions of this Court in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, and *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, as a basis for inclusion of future damages measured by past earnings of other employees and the *possibility* that the respondent may live to a required retirement date, is clearly error. The cited decisions to the extent relevant here require only recognition by the federal courts that certain rights of employees accruing under an existing agreement may be asserted, in particular circumstances, against an employer succeeding the company with which the agreement was negotiated (*Wiley*), and that the federal courts are charged with the duty of applying federal law "fashioned from the policy of our national labor laws" in resolution of labor relations controversies affecting interstate commerce (*Lincoln Mills*). These decisions do not warrant the federal courts' *creation* of new benefits for employees not found in their collective bargaining agreements with their employers. *United Steelworkers* v. *Enterprise Corporation,* 363 U.S. 593, *cf. Louisville and Nashville R. Co.* v. *Brown,* 252 F. 2d 149, 155. Yet, the lower courts rely upon the seniority provisions of the contract to justify the assessment of damages both past and in the future. Comparative seniority may reasonably be construed to furnish a basis for determining past earnings unlawfully withheld, but seniority cannot be used synonymously as job tenure upon which to calculate future wage earnings. No substantial legal authority was relied upon by the courts below to warrant the imposition of future damages calculated on conjecture and having no legal justification in the collective bargaining agreement or under the Railway

Labor Act. Particularly is such action unjust when it is noted that respondent prior to commencement of the action below voluntarily left the employ of the railroad (Pet., p. 4) and was therefore personally chargeable with any injury to flow therefrom. If restitution to a position with a proper seniority date and the past and future earnings to result therefrom was the measure of relief that respondent desired and thought he was lawfully entitled to receive, he had a complete remedy available to him by resort to statutory administrative remedies under the Railway Labor Act. *Walker* v. *Southern Railway Company,* No. 89, Oct. Term 1966, decided December 5, 1966.

The judgment and decision of the Court of Appeals, dependent as it is for its validity upon a jury's evaluation of the legal significance of technical contract provisions, and the statutory duty imposed on a collective bargaining representative by the Railway Labor Act, an evaluation made by a body inexpert in the "railroad world", "a state within a state" having "its own customs and its own vocabulary", and living "according to rules of its own making", *Whitehouse* v. *Illinois Central R. Co.,* 349 U.S. 366, 371, is hardly the vehicle upon which to justify such an incursion into the established field of railway labor jurisprudence.

The decision below, if allowed to stand, can be expected to prevent the exercise of expert judgment and discretion admittedly required of a collective bargaining agent to "sift out" the meritorious from the frivolous claims, *Humphrey* v. *Moore, supra,* and threatens substantially to eliminate the "wide range of reasonableness" permitted of collective bargaining agents, and to unfairly penalize them and the employees they represent for simply disagreeing with the

soundness of a claim advanced by one of the class it represents.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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